UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 67

Docket No. CH-1221-07-0700-M-1

Gary S. Schnell,

Appellant,

v.

Department of the Army,

Agency.

April 20, 2010

Gary S. Schnell, Sparta, Wisconsin, pro se.

Timothy D. Johnson, Esquire, Fort McCoy, Wisconsin, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the June 18, 2009 remand initial decision (RID) that denied his request for corrective action in his individual right of action (IRA) appeal. For the reasons discussed below, we GRANT the PFR under 5 C.F.R. § 1201.115, REVERSE the RID, and GRANT the appellant's request for corrective action.

BACKGROUND

¶2 On March 20, 2007, the appellant, then a GS-11 Supervisory Quality Assurance Specialist at Fort McCoy, Wisconsin,[1] filed a complaint with the Office of Special Counsel (OSC) alleging that the agency had acted in reprisal against him for protected whistleblowing. Initial Appeal File (IAF), Tab 1 at 20-34, Encls. A-F and 1-45; Tab 10, Encls. 46-57;[2] Tab 11 at 2. On April 3, 2007, OSC acknowledged receipt of his complaint, which it docketed as OSC File No. MA-07-1518. IAF, Tab 1 at 19. He submitted additional information to OSC on April 10, 2007, and May 14, 2007. *Id.*, Tab 10. On May 25, 2007, OSC issued a preliminary determination to close its inquiry into his complaint. *Id.* The appellant filed a response to the preliminary determination. *Id.* On July 23, 2007, however, OSC notified the appellant that it had informed him in its closure letter of that date[3] that it had terminated its inquiry into his allegations. It further notified him of his right to seek corrective action from the Board. IAF, Tab 1 at 16.

¶3 On September 25, 2007, the appellant filed his IRA appeal. IAF, Tabs 1, 10. The administrative judge notified the appellant of the standards for proving jurisdiction over his case and for proving the merits of his case. *Id.*, Tabs 2, 11. After considering the parties' submissions, the administrative judge issued an

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[1] Effective February 1, 2009, the appellant was reassigned to a GS-11 Environmental Protection Specialist position. Remand Appeal File, Tab 8, Exs. 4, 5. Any personnel actions taken after the Office of Special Counsel's (OSC's) July 23, 2007 notice to the appellant that he could seek corrective action from the Board, however, are not within the Board's jurisdiction. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001) (stating that the Board has jurisdiction over an IRA appeal if, inter alia, the appellant has exhausted his or her administrative remedies before OSC).

[2] Part of the appellant's March 20, 2007 OSC complaint and his subsequent correspondence with OSC were misfiled under Initial Appeal File, Tab 10, a separate folder prefaced with the agency's 3-page response to his appeal and identified as the Agency Response File.

[3] The record does not appear to include OSC's closure letter.

initial decision (ID) dismissing the appeal for lack of jurisdiction. *Schnell v. Department of the Army*, MSPB Docket No. CH-1221-07-0700-W-1 (Initial Decision, Jan. 25, 2008). The ID became the Board's final decision when the Board denied the appellant's PFR of the ID by issuing a Final Order. *Schnell v. Department of the Army*, MSPB Docket No. CH-1221-07-0700-W-1 (July 3, 2008). The appellant then requested review of the Board's Final Order with the U.S. Court of Appeals for the Federal Circuit. Pursuant to the agency's motion, the court vacated the Board's July 3, 2008 Final Order and remanded the case for further proceedings. The court stated:

> Specifically, the Army requests further proceedings regarding whether Schnell's disclosures were made in the course of his normal duties and, in the alternative, whether he had a reasonable belief that his disclosures evidenced a violation of any law, rule, or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Schnell v. Department of the Army, 345 F. App'x 537 (Fed. Cir. 2009).

¶4 On remand, the administrative judge set forth the background of the case, in part, as follows: When he made the disclosures at issue, the appellant was supervising Quality Assurance Evaluators (QAEs) and overseeing the Quality Assurance program for work performed on a $109 million contract, Directorate of Support Services (DSS) A-76. According to him, he wrote the Quality Assurance Surveillance Plan (QASP) for DSS A-76 in March 2003, when the contract was 3 months old, and revised it 17 times, including the version in use when the Army Audit Agency (AAA) began its audit in December 2004. He disclosed problems with the inspection process and other matters to AAA auditors, the local Inspector General (IG), the Army Chief of Staff for Installation Management (ACSIM), and the Installation Management Agency (IMA). The appellant alleged that, on March 6, 2006, the agency implemented a new QASP that did not reflect the changes he made to the old QASP, but rather was a "near duplicate" of his unedited first version, and that the change altered his duties significantly. In

July 2006, the AAA issued its audit report, finding Fort McCoy must improve its monitoring of contractor performance. The DSS A-76 contract ended in 2008, resulting in several smaller contracts. The appellant's position was eliminated and the agency reassigned him to his current position on February 1, 2009. RID at 2-5.

¶5 The administrative judge found that the appellant had established Board jurisdiction over his appeal. In that regard, she found that the appellant alleged that the agency had curtailed his job responsibilities, denied him a temporary promotion, and threatened to separate him in reprisal for his disclosures to the AAA, the ACSIM, the IMA, and the IG. RID at 6.

¶6 The administrative judge found that the appellant made a non-frivolous allegation that he made protected disclosures to the AAA when he disclosed that management's "arbitrary rules and constraints" allowed only limited inspection of the contract, the majority of QAEs were unqualified, the local contracting office did not process Contract Discrepancy Reports (CDRs), and employees performed their work without an approved QASP. She noted that the AAA's audit report found that, because of control weaknesses in monitoring contractor workload, the reasonableness of a $6.6 million cost increase could not be determined. She found that the appellant was in a position to reasonably believe that the QASP was improper because he alleged that he drafted and worked on its revisions, and to reasonably believe that the employees inspecting the contract were not properly trained because he was the first-line supervisor for 18 QAEs. She found that, because the reasonableness of a $6.6 million cost increase could not be determined based at least in part on deficiencies the appellant was in a position to observe and that he disclosed, the content of his disclosure to the AAA was protected. RID at 7-8. She further found that the appellant's disclosures to the AAA were not made in the normal course of his duties. She found that the agency conceded that the appellant was not directed by his supervisors to provide information to the AAA. She further found that the appellant demonstrated that

his position required him to disclose only contractor inadequacies, not deficiencies in the agency's oversight of contractors, as part of his regular duties. She therefore found that he had shown that his disclosures were covered by the Whistleblower Protection Act under *Kahn v. Department of Justice*, 528 F.3d 1336, 1343 (Fed. Cir. 2008), and *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352-54 (Fed. Cir. 2001). RID at 9.

¶7 The administrative judge also found that the appellant made a non-frivolous allegation that he made a protected disclosure to the IG. Specifically, she found that the appellant made a series of disclosures to the IG in which he alleged that the agency blurs the lines of authority, confuses objective surveillance with subjective surveillance, employs an inexperienced and untrained alternate Contracting Officer's Representative, fails to provide the necessary standards for writing CDRs, and pays twice for unspecified services. She found that the appellant had shown that his disclosures to the IG were protected under *Huffman* for the same reasons she found that his disclosures to the AAA were protected. RID at 12.

¶8 Citing *Meuwissen v. Department of the Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000), the administrative judge found that the appellant did not sufficiently allege that he made protected disclosures to ACSIM and IMA when he told Master Planner Gregory Brewer and Bradley Bush that Fort McCoy had published a local supplement to AR 210-20 because the information was publicly known. RID at 10-12. The administrative judge also found that the appellant did not sufficiently allege that he made a protected disclosure to the IMA when he sent an e-mail to Ken Krambeck because he did not sufficiently allege that he disclosed anything protected under 5 U.S.C. § 2302(b)(8). RID at 11.

¶9 The administrative judge found that the appellant made a non-frivolous allegation that his protected disclosures were a contributing factor in the agency's decision to take or fail to take a personnel action. RID at 12-13. She concluded as follows:

> Because the appellant exhausted his administrative remedies before OSC and made nonfrivolous allegations that he engaged in whistleblowing activity by making a protected disclosure, and that the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action, I find the Board has jurisdiction over his IRA appeal. *See Yunus*, 242 F.3d at 1371.

Id. at 13.

¶10 The administrative judge denied the appellant corrective action on the merits, however. The administrative judge acknowledged the appellant's allegations that the agency curtailed his job responsibilities effective March 2006, when it implemented the new QASP, and denied him a temporary promotion that his normal duties would have included. She found, though, that the appellant did not show that his job responsibilities were greatly reduced after the QASP was implemented, that he applied for the temporary promotion, or that his normal duties would have included a temporary promotion. Thus, she found that he failed to show that the agency took a "personnel action" against him within the meaning of the Whistleblower Protection Act. RID at 14-15. The administrative judge further found that the appellant did not exhaust before OSC his allegation that the agency "divided his job into three jobs (in 2007) and singled out his job for elimination." *Id.* at 15. She noted that the appellant also discussed reductions in force (RIFs) that occurred prior to his disclosures. She found that those actions do not constitute personnel actions under the Whistleblower Protection Act. *Id.* at 15. She found that the appellant had not shown that any change in his duties in connection with the contract amounted to a personnel action. *Id.* at 16.

¶11 The appellant has filed a PFR. PFR File, Tab 1. The agency has filed a response opposing the PFR. *Id.*, Tab 3.

ANALYSIS

¶12 The appellant has contested some of the administrative judge's statements and findings in the "Background" and "Jurisdiction" sections of the RID. PFR at 1-7. He has failed to show, however, that the administrative judge committed any

error that prejudiced his substantive rights. Therefore, his assertions of error do not provide a basis for reversing the RID. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). The appellant has also contested the administrative judge's finding that he failed to establish that the agency significantly changed his duties after implementing the March 2006 QASP. PFR at 7-9. We find that the appellant's allegations constitute mere disagreement with the administrative judge's explained factual findings and legal conclusions. Therefore, they do not provide a basis for Board review. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

The administrative judge erred in finding that the appellant did not apply for a temporary position.

¶13 The appellant apparently asserts that the administrative judge erred in finding that he did not establish that he applied for a temporary position, stating: "I thought that I had established that but please see additional enclosures A and B." PFR at 9. He has submitted an August 31, 2006 "self nomination confirmation" for announcement # NCDE06457422P and an October 31, 2006 answer indicating that he was referred for a GS-12 Facility Operations Specialist position under that announcement number, but not selected for the position. PFR File, Encls. A, B.

¶14 The administrative judge erred in finding that the appellant failed to establish that he applied for the temporary position. Granted, the documents the appellant submits for the first time on review are dated before the record closed below and he has not shown that they were unavailable, despite his due diligence, before then. Normally, the Board would not consider such documents on review. *See Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Here, however, we find that the appellant submitted sufficient information below, albeit not clearly presented, to show that he applied for the position. In his April 10, 2007 OSC submission, the appellant stated that his Enclosure 9 was the screenshot of

the status of his applications for several jobs. IAF, Tab 10, April 10, 2007 OSC Complaint at 19. Enclosure 9 states under Announcement # NCDE06457422P, "Your resume has been referred to the selecting official for consideration for this vacancy." IAF, Tab 10. The agency has not asserted that the appellant did not apply for the position. Moreover, in its May 25, 2007 preliminary determination, OSC acknowledged the appellant's allegation that, because of his whistleblowing activities, he was denied a temporary promotion. *Id*. Indeed, in her January 25, 2008 ID, the administrative judge stated that "the appellant applied for temporary promotion and was not selected." ID at 6.

The administrative judge erred in finding that the appellant did not exhaust with OSC his allegation that the agency divided his position into three positions and singled out his position for elimination.

¶15 The appellant also contests the administrative judge's finding that he did not exhaust with OSC his allegation that "the agency divided his job into three jobs (in 2007) and singled out his job for elimination." He refers to his May 10, 2007 OSC submission as showing the following: The present contract was to be divided into four contracts: on-post Logistics (supply and transportation); on-post Logistics (Materiel Maintenance); on-post Public Works; and off-post Reserve Center Maintenance. The first three would be retained by the Fort McCoy DSS, and the off-post contract would be turned over to the new 88th RRSC [apparently, U.S. Army Reserve Command]. His name did not appear on the chart for the new organizational structure that was handed out at the DSS on-post meeting on April 24, 2007. He asserted that he was the QA Supervisor for all four areas under "the present contract (old)," that three GS-12 contracting clerks were taking the place of one "GS-11 (degreed engineer) supervising the on-post QAEs" (presumably, him), and that the status of supervision of the off-post portion was unknown. A May 1, 2007 e-mail from his second-level supervisor, Director of Support Services Darrell Neitzel, summarized an April 30, 2007 meeting the appellant had with Neitzel and the appellant's first-level

supervisor, John Calvert. The e-mail stated that the appellant's position as a QAE supervisor would be eliminated under the new DSS structure and set forth his options. The appellant asserted that he was the only government employee at Fort McCoy DSS whose job was being eliminated by the "reorganization," and that his options were to retire or go on priority placement. PFR at 9-10; IAF, Tab 10, May 14, 2007 OSC Submission. In his PFR, the appellant contends that this was the threat of a RIF; that a RIF, involuntary retirement, and priority placement, are all personnel actions; and that the agency acted in reprisal for his protected disclosures. PFR at 10.

¶16 The administrative judge erred in finding that the appellant did not exhaust before OSC an allegation that the agency singled out his job for elimination. Although the point of the appellant's contention in his May 14, 2007 submission was somewhat vague, his response to OSC's preliminary determination to close its investigation was clear. There he stated that, since his March 20, 2007 original submission, he had been told that there would be a "reorganization" and his job would be eliminated; he had been given the option of retiring or entering the priority placement program; his position was the only one being eliminated; and he had submitted this as additional information in his May 14, 2007 submission. IAF, Tab 10. Moreover, he submitted the May 1, 2007 e-mail from Neitzel which stated: "Situation: Under the new DSS structure to manage our three new BASOPS [base operations] contracts, your position as a QAE supervisor will be eliminated." *Id*. Thus, the appellant exhausted his administrative remedies before OSC with respect to this allegation. *See, e.g., Johns v. Department of Veterans Affairs*, 95 M.S.P.R. 106, ¶¶ 15-18 (2003) (stating that proof of exhaustion need not be in the form of the appellant's complaint to OSC; the Board will also consider evidence of either written correspondence or oral communication with OSC).

The appellant's non-selection for a temporary position and the threatened elimination of his position are personnel actions.

¶17 The appellant's non-selection for the GS-12 temporary position and the threatened elimination of his QAE Supervisory position are personnel actions under the Whistleblower Protection Act. 5 U.S.C. § 2302(a)(2)(A); *Godfrey v. Department of the Air Force*, 45 M.S.P.R. 298, 303 (1990). As discussed above, the appellant established that he exhausted those allegations before OSC. Thus, we must consider the other merits issues in his appeal.

The appellant established by preponderant evidence that he made a protected disclosure and that the disclosure was a contributing factor in an agency personnel action.

¶18 In reviewing the merits of an IRA appeal, the Board must examine whether the appellant proved by preponderant evidence that he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and that such whistleblowing activity was a contributing factor in an agency personnel action; if so, the Board must order corrective action unless the agency established by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *See, e.g., Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296, ¶ 15 (2008). We can make these determinations at this level because the appellant did not request a hearing and the evidence of record is complete. *See, e.g., Azbill v. Department of Homeland Security*, 105 M.S.P.R. 363, ¶ 16 (2007).

¶19 A protected disclosure is a disclosure that an appellant reasonably believes evidences a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)(A); *Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008). A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the actions of the government evidence one of the categories in section 2302(b)(8)(A). *Lachance v.*

White, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000). To establish that the appellant had a reasonable belief that a disclosure met the criteria of 5 U.S.C. § 2302(b)(8), he need not prove that the condition disclosed actually established a regulatory violation or any of the other situations detailed under 5 U.S.C. § 2302(b)(8)(A)(ii); rather, the appellant must show that the matter disclosed was one which a reasonable person in his position would believe evidenced any of the situations specified in 5 U.S.C. § 2302(b)(8). *Garst v. Department of the Army*, 60 M.S.P.R. 514, 518 (1994).

¶20 Here, the record indicates that the appellant made disclosures to the AAA beginning in January 2005 to approximately July 2006. IAF, Tab 1 at 28, 44-49, Encls. 1, 3-6, 8-32. He made disclosures to the IG in May 2005 and March to June 2006. *Id.*, Tab 1 at 24, 28, 36, 49-50, Encls. 33-35. As found by the administrative judge, the appellant disclosed to the AAA that problems existed with the inspection process and other matters, including the QASP, and disclosed to the IG that the agency blurred the lines of authority, confused surveillance concepts, employed inexperienced and untrained personnel, failed to provide necessary standards, and overpaid for services. RID at 3-4, 7-8, 12. We find that in making these disclosures, the appellant, at a minimum, disclosed a violation of law, rule, or regulation, which was protected under 5 U.S.C. § 2302(b)(8)(A)(i). In particular, the appellant has shown that these disclosures exposed potential violations of the Federal Acquisition Regulations, 48 C.F.R., part 46, relating to quality assurance in government contracting. *See Reid v. Merit Systems Protection Board*, 508 F.3d 674, 678 (Fed. Cir. 2007) (finding section 2302(b)(8)(b) may be satisfied by a disclosure of a violation of the Federal Acquisition Regulations). As also found by the administrative judge, the appellant was in a position to reasonably believe his disclosures because he was the first-line supervisor for 18 QAEs, and the reasonableness of his belief was validated by the AAA's July 2006 report, which found that Fort McCoy must improve its monitoring of contractor performance. RID at 5, 7-8; IAF, Tab 10,

Encl. 53. Thus, we conclude that the appellant proved by preponderant evidence that he made protected disclosures.

¶21 An employee may demonstrate that a disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure, and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *Scott v. Department of Justice*, 69 M.S.P.R. 211, 238 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table). Once the knowledge/timing test has been met, an administrative judge must find that the appellant has shown that his whistleblowing was a contributing factor in the personnel action at issue, even if, after a complete analysis of all of the evidence, a reasonable factfinder could not conclude that the appellant's whistleblowing was a contributing factor in the personnel action. *Carey v. Department of Veterans Affairs*, 93 M.S.P.R. 676, ¶ 13 (2003).

¶22 The administrative judge found that Calvert was aware of the appellant's disclosure to the AAA. RID at 3; *see also* IAF, Tab 14, Ex. 2. She also found that, although the appellant told the IG that he wished to remain anonymous, the nature of his complaints made it evident that they could have come only from him. RID at 12. As previously noted, the appellant submitted an October 31, 2006 answer indicating that he was not selected for the temporary position. As also previously noted, he submitted a May 1, 2007 e-mail summarizing an April 30, 2007 meeting and stating that his position would be eliminated under the new DSS structure. Those personnel actions occurred within approximately 1 to 2 years of the appellant's protected disclosures to the AAA and the IG. The Board has found that comparable periods of time between a protected disclosure and a personnel action can satisfy the knowledge/timing test. *See, e.g., Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250 (2008) (finding that the appellant's disclosures were a contributing factor in his removal when they were

made over 1 year before his removal); *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, ¶ 87 (2001) (finding that the appellant's disclosures were a contributing factor in her removal when they were made approximately 21 months and then slightly over a year before the agency removed her), *review dismissed*, 32 F. App'x 543 (Fed. Cir. 2002); *Jones v. Department of the Interior*, 74 M.S.P.R. 666, 676 (1997) (finding that the appellant's disclosures were a contributing factor in the lower rating the agency gave him in his performance evaluation, which occurred over a year after he made the disclosures). We therefore find that the appellant has satisfied the knowledge/timing test. As such, we find that the appellant proved by preponderant evidence that a protected disclosure was a contributing factor in an agency personnel action.

The agency failed to prove by clear and convincing evidence that it would have taken the same personnel actions absent any protected disclosures.

¶23 In determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of whistleblowing, the Board will consider whether the agency had legitimate reasons for the personnel action, the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision, and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *See, e.g.*, *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999); *Gonzales v. Department of the Navy*, 101 M.S.P.R. 248, ¶¶ 11-12 (2006). Clear and convincing evidence is "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." 5 C.F.R. § 1209.4(d).

¶24 We find that the agency has failed to prove by clear and convincing evidence that it would have taken the personnel actions absent any protected disclosures. As discussed above, the appellant asserted that he applied for the temporary position in August 2006 that included his normal duties, and that the

agency divided his position into three positions in 2007 and singled his position out for elimination. In response, the agency submitted affidavits from Calvert and Neitzel containing only general statements that they never took any retaliatory personnel actions against the appellant. IAF, Tab 14, Exs. 2, 3; RAF, Tab 8, Exs. 2, 3. Neither Calvert nor Neitzel, however, provided any detailed explanation as to why the agency selected other applicants over the appellant for these positions that had considerable overlap with his then current position. Nor did the agency present any other evidence of the selection procedure that it followed in filling the positions or that would explain why the appellant was not considered the top applicant for them. Accordingly, the agency has failed to meet its burden of producing in our minds a "firm belief" that it would have taken the same personnel actions in the absence of the appellant's protected disclosures. Thus, we find that the appellant is entitled to corrective action in this case.

The appellant is entitled to corrective action.

¶25 Generally, an appellant who prevails in an IRA appeal is entitled to status quo ante relief that includes the following: cancellation of the retaliatory personnel action; the appellant's reinstatement to his former position or to another substantially equivalent position, as appropriate; back pay; interest on back pay; and other employment benefits that he would have received had the action not occurred. 5 U.S.C. § 1221(g)(1); *Armstrong v. Department of Justice*, 107 M.S.P.R. 375, ¶ 34 (2007). Here, the appellant's previous GS-11 position has been eliminated. However, we find that the earliest promotion opportunity for the appellant that may have been lost as a result of reprisal for his disclosures was the GS-12 position that he applied for and was not selected for on October 31, 2006. Thus, we find it appropriate to order the agency to promote the appellant to the GS-12 grade level effective October 31, 2006. *See Armstrong*, 107 M.S.P.R. 375, ¶ 34.

ORDER

¶26 We ORDER the agency to promote the appellant to the GS-12 grade level effective October 31, 2006. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶27 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶28 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶29 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶30 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision

are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶31 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST CONSEQUENTIAL DAMAGES

You may be entitled to be paid by the agency for your consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages. To be paid, you must meet the requirements set out at 5 U.S.C. §§ 1214(g) or 1221(g). The regulations may be found at 5 C.F.R. §§ 1201.202, 1201.202 and 1201.204. If you believe you meet these requirements, you must file a motion for consequential damages WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You

must file your motion with the office that issued the initial decision on your appeal.

NOTICE TO THE PARTIES

A copy of the decision will then be referred to the Special Counsel "to investigate and take appropriate action under [5 U.S.C.] section 1215," based on the determination that "there is reason to believe that a current employee may have committed a prohibited personnel practice" under 5 U.S.C. § 2302(b)(8). 5 U.S.C. § 1221(f)(3).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at

our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's" Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.